

**Introduced by Senator Harman**February 19, 2008

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An act to amend Section 21320 of, to add Chapter 1 (commencing with Section 21310) to Part 3 of Division 11 of, and to repeal Chapter 1 (commencing with Section 21300) of Part 3 of Division 11 of, the Probate Code, relating to wills and trusts.

## LEGISLATIVE COUNSEL'S DIGEST

SB 1264, as introduced, Harman. Wills and trusts: no contest clauses.

Existing law, in relation to wills, trusts, and other instruments, defines and regulates no contest clauses, which are provisions in otherwise valid instruments that, if enforced, penalize beneficiaries if the beneficiaries file a contest with the court. Existing law provides that a no contest clause in a will or a trust is generally enforceable and defines a "contest" and "direct contest" in this regard. Existing law provides that certain actions do not constitute a contest unless expressly identified in the no contest clause as a violation. Existing law exempts certain contests from the enforcement of the no contest clause under specified circumstances, including if there is reasonable cause to believe that instrument has been revoked. Existing law permits a beneficiary to apply to a court for a determination of whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of a no contest clause.

This bill, beginning January 1, 2010, would revise, recast, and clarify these provisions. The bill would limit the application of a no contest clause to specific contests. The bill would redefine "direct contest," and would provide that a no contest clause may be enforced against a direct contest only when it is brought without probable cause, which the bill would define for these purposes. The bill would revise provisions

regarding the authority of a beneficiary to apply to a court for a determination regarding a no contest clause, as described above, to limit the scope of those provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Chapter 1 (commencing with Section 21300) of  
2 Part 3 of Division 11 of the Probate Code is repealed.

3 SEC. 2. Chapter 1 (commencing with Section 21310) is added  
4 to Part 3 of Division 11 of the Probate Code, to read:

5  
6 CHAPTER 1. GENERAL PROVISIONS

7  
8 21310. As used in this part:

9 (a) “Contest” means a pleading filed with the court by a  
10 beneficiary that would result in a penalty under a no contest clause,  
11 if the no contest clause is enforced.

12 (b) “Direct contest” means a contest that alleges the invalidity  
13 of a protected instrument or one or more of its terms, based on one  
14 or more of the following grounds:

15 (1) Forgery.

16 (2) Lack of due execution.

17 (3) Lack of capacity.

18 (4) Menace, duress, fraud, or undue influence.

19 (5) Revocation of a will pursuant to Section 6120, revocation  
20 of a trust pursuant to Section 15401, or revocation of an instrument  
21 other than a will or trust pursuant to the procedure for revocation  
22 that is provided by statute or by the instrument.

23 (6) Disqualification of a beneficiary under Section 6112 or  
24 21350.

25 (c) “No contest clause” means a provision in an otherwise valid  
26 instrument that, if enforced, would penalize a beneficiary for filing  
27 a pleading in any court.

28 (d) “Pleading” means a petition, complaint, cross-complaint,  
29 objection, answer, response, or claim.

30 (e) “Protected instrument” means all of the following  
31 instruments:

32 (1) The instrument that contains the no contest clause.

1 (2) An instrument that is in existence on the date that the  
2 instrument containing the no contest clause is executed and is  
3 expressly identified in the no contest clause, either individually or  
4 as part of an identifiable class of instruments, as being governed  
5 by the no contest clause.

6 21311. (a) A no contest clause shall only be enforced against  
7 the following types of contests:

8 (1) A direct contest that is brought without probable cause.

9 (2) A pleading to challenge a transfer of property on the grounds  
10 that it was not the transferor's property at the time of the transfer.  
11 A no contest clause shall only be enforced under this paragraph if  
12 the no contest clause expressly provides for that application.

13 (3) The filing of a creditor's claim or prosecution of an action  
14 based on it. A no contest clause shall only be enforced under this  
15 paragraph if the no contest clause expressly provides for that  
16 application.

17 (b) For the purposes of this section, probable cause exists if, at  
18 the time of filing a contest, the facts known to the contestant would  
19 cause a reasonable person to believe that there is a reasonable  
20 likelihood that the requested relief will be granted after an  
21 opportunity for further investigation or discovery.

22 21312. In determining the intent of the transferor, a no contest  
23 clause shall be strictly construed.

24 21313. This part is not intended as a complete codification of  
25 the law governing enforcement of a no contest clause. The common  
26 law governs enforcement of a no contest clause to the extent this  
27 part does not apply.

28 21314. This part applies notwithstanding a contrary provision  
29 in the instrument.

30 21315. (a) Except as provided in Section 3, this chapter applies  
31 to any instrument, whenever executed, that became irrevocable on  
32 or after January 1, 2001.

33 (b) This chapter does not apply to an instrument that became  
34 irrevocable before January 1, 2001.

35 SEC. 3. Section 21320 of the Probate Code is amended to read:

36 21320. (a) If an instrument containing a no contest clause is  
37 or has become irrevocable, a beneficiary may apply to the court  
38 for a determination of whether ~~a particular motion, petition, or~~  
39 ~~other act by the beneficiary, including, but not limited to, creditor~~  
40 ~~claims under Part 4 (commencing with Section 9000) of Division~~

1 7, Part 8 (commencing with Section 19000) of Division 9, an action  
2 pursuant to Section 21305, and an action under Part 7 (commencing  
3 with Section 21700) of Division 11, would be a contest within the  
4 terms of the no contest clause *the no contest clause could be*  
5 *enforced against a particular pleading under paragraph (2) or (3)*  
6 *of subdivision (a) of Section 21311. The court shall not make a*  
7 *determination under this section if the determination would depend*  
8 *on the merits of the proposed pleading.*

9 (b) A no contest clause is not enforceable against a beneficiary  
10 to the extent an application under subdivision (a) is limited to the  
11 procedure and purpose described in subdivision (a).

12 ~~(c) A determination under this section of whether a proposed~~  
13 ~~motion, petition, or other act by the beneficiary violates a no~~  
14 ~~contest clause may not be made if a determination of the merits~~  
15 ~~of the motion, petition, or other act by the beneficiary is required.~~

16 ~~(d) A determination of whether Section 21306 or 21307 would~~  
17 ~~apply in a particular case may not be made under this section.~~

18 SEC. 4. This act becomes operative on January 1, 2010.